SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 50

GENT, SWANK, BACHELOR, CAVALCADE, GENTLEMAN, ACE and SIR (MAGAZINES), and PAR PUBLICATIONS, INC., ROYAL PUBLICATIONS, INC., MAGTAB PUBLICATIONS CORP., SKYE PUBLISHING CO. INC., BRUCE-ROYAL PUBLISHING CO., FOUR STAR PUBLICATIONS, INC. and VOLITANT PUBLISHING CORP.,

Appellants,

—against—

THE STATE OF ARKANSAS,

Appellee.

ON APPEAL TO THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF OF APPELLANTS

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Opinions Below

The Supreme Court of Arkansas wrote an opinion which is reported in 393 South Western Reporter 2d 219. The trial court did not write an opinion.

Jurisdiction

(i) This case arises from a decree entered in the Jefferson County, Chancery Court, First Division of Arkansas, which found certain issues of the above-named magazines to be obscene, enjoined their distribution, decreed their destruction, directed the appellants to surrender all other copies of the issues for destruction, and retained jurisdiction to determine whether any future issues are obscene

and whether or not they come within the terms of the decree and that any future issues will be enjoined upon a showing that the magazines are obscene, and to make such orders as may be necessary concerning the future sale of the above mentioned magazines.

(ii) The judgment of modification and affirmance was made and entered by the Supreme Court of Arkansas on May 24, 1965, Record page 40. Timely petitions for a rehearing were filed in the Supreme Court of Arkansas on June 7, 1965, R. 56, 58. They were entertained and considered on the merits by that court, R. 57, 60. Their timeliness is certified by the court, R. 57, 60. The applications for a rehearing were denied by orders each dated and entered on September 20, 1965, R. 57, 60.

The Notice of Appeal was filed on December 10, 1965 in the Supreme Court of Arkansas, the court possessed of the record, R. 61.

(iii) The jurisdiction of this court is conferred by 28 U.S.C. Section 1257(2).

(iv) The following decisions sustain the jurisdiction of this court to review judgments by appeal in this case: *Winters* v. *New York*, 333 U. S. 507; *Dahnke-Walker Mill Co.* v. *Bondurant*, 257 U. S. 282; *Jacobellis* v. *State of Ohio*, 378 U. S. 184; *Department of Banking* v. *Pink*, 317 U. S. 264, 266; *Bowman* v. *Loperena*, 311 U. S. 262, 266.

(v) Probable jurisdiction was noted by this court on May 16, 1966, limited to Questions 1 and 2.

Statute Involved

The statute involved is Act No. 261 of the Laws of 1961, Ann. Stat. 41-2713-41-2728, which is more fully set forth in Appendix A (p. 20 *post*):

Questions Presented

1. Is Act 261 of the Arkansas Acts of 1961 invalid in that on its face and as applied it impairs the freedom of expression protected by the First and Fourteenth Amendments to the Constitution of the United States in that it operates as a forbidden prior restraint on expression?

2. Is Act 261 of the Arkansas Acts of 1961 invalid in that on its face and as applied it impairs the freedom of expression protected by the First and Fourteenth Amendments to the Constitution of the United States, in that it is vague and uncertain?

Statement

The Prosecuting Attorney for the Eleventh Judicial District, of which Jefferson County, Arkansas, is a part, on "probable cause" commenced this action in the Jefferson County, Chancery Court, First Division, under Act 261 of 1961 of the laws of Arkansas against appellants, who are non-resident publishers (R. 1-2) to have certain issues of the magazines in the caption of this action be declared obscene, enjoining their distribution and that the copies in the custody of the appellants be surrendered and destroyed (R 1.). The statute provides for the complaint to be directed against the magazine by name as well as the publisher or distributor, thus accounting for the names in the caption. The particular issues of the magazines involved are set forth in the decree (R. 28).

The appellants answered, denied the obscenity of the issues of the magazine, and challenged the constitutionality of the statute on its face and as to its applicability (R. 6-12).

The cause came on for trial before the court and an advisory jury. The jury held all the particular issues of the

magazines to be obscene (R. 27). Thereupon a decree was entered against the appellants holding the magazines to be obscene, enjoining their distribution in *Jefferson County*, directing the destruction of the magazines within ten days, and retaining jurisdiction to restrain future issues of the magazines and to make any orders concerning future issues of the magazines (R. 28). The trial court refused to permit Gent to file an answer, and judgment went against it by default.*

The appellants appealed to the Supreme Court of Arkansas which by a vote of 5-2, modified the decree to the extent of permitting Gent and its publisher to be a party to the appeal, but affirmed as to all the substantive questions raised (R. 30, 55). The appellants made timely applications for a rehearing, but which were denied on the merits (R. 56-61).

POINT I

The statute on its face is an unconstitutional restraint on interstate dissemination of literature.

By way of introduction it should be noted that the judgment of the Supreme Court of Arkansas was decided by a vote of 5-2. Both the majority and minority wrote with an expectation that this court should ultimately decide this case. The majority observed:

> "We know not what the United States Supreme Court may hold as to these magazines, or the validity

* The Supreme Court held, however, that the Chancellor was in error and granted that magazine permission to argue in the appeal on the merits.

of Act 261. Let here be said that, if a firm and clear guideline had been established, we should certainly follow it, for we recognize that the rulings of The United States Supreme Court are controlling, and, in conformity to the legal process, must be adhered to. But as previously pointed out, we find no definite determination by a court majority that a 'national standard shall apply'."

And in a prelude to these thoughts, that court said:

> "In doing so, we enter into a field marked and characterized by uncertainty. In fact, we know of no area of law in which there is more confusion, and the most recent opinion handed down by the nation's highest court, rather than contributing to clarity, has actually compounded the confusion."

The dissenters said:

> "In view of the fact that undoubtedly this case will go to the U. S. Supreme Court for a final decision, I see no point in elaborating on the construction placed on the First Amendment by the majority of our court, which is contrary to the construction of the Amendment by the U. S. Supreme Court in many cases (citing cases). . . In my opinion the decision in this case will be reversed by the U. S. Supreme Court."

The Statute

It will be noticed that the statute is most unusual in many parts, the pertinent ones being as follows:

1. The statute is directed against out-of-state, non-resident publishers.

2. In its proscriptions against non-resident publishers the statute seeks to control the interstate movement of

publications and importation of them into Arkansas by mail and otherwise.

3. The orders and decrees provided by the statute reach into the home operations of the non-resident publisher.

Since this case is the first one under the statute, there are no constructions of it other than those found in this case.

The Supreme Court of Arkansas with respect to the attacks on the validity of the statute said:

> "We do not agree with appellants that Act 261, as here applied, violates the First and Fourteenth Amendments to the Constitution of the United States, as abridging freedom of speech and press, nor that it deprives appellants of their property without due process of law."

Section 2714 last sentence, states that among the purposes of the statute is to provide prosecuting attorneys "with an effective power to reach non-residents responsible for the composition, publication and distribution of obscene publications within the State."

In other words, the objective is not merely to control distribution of publications within the State of what is regarded as offensive literature, but in addition, seeks to reach out beyond state lines and control,

(a) composition of writings, and

(b) publication of writings.

To implement these objectives, the statute provides:

1. Consent to jurisdiction (Section 2728). Every non-resident shipper of books is deemed to have submitted him-

self to the jurisdiction of Arkansas by reason of having sent books there.

2. Provision is made (Section 2717) for the commencement of an action by the Prosecuting Attorney of any county into which such matter is sent for an adjudication of the obscenity of the "mailable matter". ("Mailable matter" is defined as that having second class mailing privileges or which has not been declared non-mailable under the laws of the United States, Section 2715(1)). Service of process may be made by registered mail on the non-resident (Section 2719).

3. Penalties.

(a) A person who sends into the State any obscene matter, whether previously adjudicated obscene under the Act or not, shall be guilty of a *felony*, and shall be fined no more than $2,000 or be imprisoned for not less than one year nor more than five years, or both fined and imprisoned (Section 2716).

(b) a court after determining that the character of a publication is obscene, may

(i) enjoin shipment of such matter into the State;

(ii) direct a sheriff of the state to seize and destroy all such matter *wherever* it may be found.

(c) Disobedience of the judgment shall be deemed a contempt Section 2725).

(d) Extradition of the non-resident for contempt is provided (Section 2726), and since a felony *prosecution* may be commenced, extradition for it may ensue.

The operation and effect of these statutes on non-residents can be determined from the facts in this case. The

appellants are all non-resident publishers (R. 1-2, 6). All appellants, except Bruce-Royal Publishing Co.—"Gentlemen", publish in New York, New York (R. 1-2). Their publications have nation-wide distribution. According to customs and practice distribution is made by a publisher to a nation-wide distributor who in turn has state and local wholesalers, or the publisher may distribute to state wholesalers, or the publication may be sent by mail from the publisher.

A publisher usually publishes in accordance with the law of the place of publication, whether the standard of the publisher's state be a local community standard or a national one. His guide is what is permitted by his place of operation. Yet under this Arkansas statute, the New York publisher becomes subject to a felony prosecution if a publication is mailed or shipped into a county of Arkansas, and subsequently determined there to be obscene. This proscription applies whether (a) it is shipped or mailed (Section 2716 subjects to penalty "other than mailable matter"). The criminal penalty under 2716 also applies when interstate shipments into a county are made subsequent to a judgment enjoining the material.

The appalling consequences to a publisher, and thus to the free movement of literature throughout the states, is not merely the power of a single county, as in this case, to bar the movement of literature interstate. What is worse, is that it provides a county with the power to put in prison a non-resident publisher who publishes in accordance with the standards of his home state. For the moment, let the argument confine itself to those situations in Section 2716 where the penalty applies to those publishers who ship or mail *before* an action has been commenced against them,

as was the case here. If all states other than the publisher's home state were to have similar laws, a publisher could not conduct his business. One shipment of a single issue of a magazine to all states other than that of publication could result in 49 convictions for 49 felonies, 245 years of imprisonment (5 years times 49 states) and $98,000 in fines, at $2,000 per state. And this does not take into account the separate power of each county within a state!

It needs no great exposition to demonstrate that under laws there is an unwarranted burden on publication in violation of the First Amendment. Were each state (and county) endowed with the power to erect the barrier to terrorize and intimidate out-of-state publishers there could be no free flow of ideas.

What was said above about matter other than "mailable matter", applies also in the case of mailable matter found by a court to be obscene and enjoined from shipment. Under the statute a decree does not only operate within the state but seeks to extend its power beyond state lines.

Under such laws a publisher with national distribution could not function. He could not anticipate what a particular state may subsequently determine obscene by its standards, as distinct from the standards of the state of origin. In terror of such laws, a publisher would be intimidated and discouraged from shipping.

Section 2722(a) allows an injunction against doing any act forbidden by the statute. This means that a decree could forbid a non-resident from preparing or possessing the materials that a county in Arkansas could forbid. This is not a remote possibility because the decree in this case enjoined appellants from (a) possessing any of the maga-

zines and (b) directed their destruction within ten days. And Section 2722(c) authorizes a sheriff to seize the publications in possession and control of a respondent *wherever* the same may be found.

Should the non-resident publisher fail to comply with the decree he becomes subject to contempt proceedings (2725) for which he may be extradited (2726). Thus, if appellants do not destroy the publications in their possession or refrain from distributing them, they might be extradited to Arkansas to answer a charge of contempt, all based on jurisdiction originally obtained by publication, as the statute permits (Section 2719).

The statute in this case cannot find support in *Kingsley Books Inc.* v. *Brown,* 354 U.S. 436. In that case, this court approved by 5 to 4 a statute which provided for injunctive proceedings against books found *within* the State of New York. That case with its species of censorship, should be reviewed by this court and overruled for the reason that it is a prior restraint, prohibited by *Near* v. *Minnesota,* 283 U.S. 697. In any event, the Arkansas statute goes beyond the New York law. Arkansas seeks to control the interstate shipment of literature, seeks to exclude the importation thereof into Arkansas and seeks to control the possession of the proscribed literature by the non-resident publisher. The difference is illustrated in *Bowman* v. *Chicago,* etc., 125 U.S. 465 and *Leisy* v. *Hardin,* 135 U.S. 100 where the court held that a state could regulate alcoholic beverages found within the state, but it could not exclude their importation into the state. See also, *International Textbook Co.* v. *Pigg,* 217 U.S. 91 as to regulation of a non-resident correspondence school.

In *Lovell* v. *Griffin*, 303 U.S. 444 this court affirmed that the distribution of literature enjoys the same protection as publication, because distribution is a necessary concomitant of publication. Yet this statute burdens the distribution of literature without end. It subjects to the jurisdiction of Arkansas every publisher who sends a piece of literature there (Section 2728). It makes no difference under that section of the statute what contacts, if any, and to what degree, a publisher may have with Arkansas. Mere shipment suffices. Such claim of jurisdiction rests on a fiction that it is the publisher who "imports" the material (2728). What effect such claim of jurisdiction can do to the free flow of thought as well as of commodities is well explained in Sobeloff, *Jurisdiction of State Courts Over Non-Residents in Our Federal System*, 43 Cornell L.Q. 196. See also, *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250, *International Shoe Co.* v. *Washington*, 326 U.S. 310, 318.

In this connection it should not be overlooked that by reason of the assertion of this jurisdiction the statute provides that although jurisdiction is obtained by publication, the State of Arkansas may nevertheless assert personal claims in the form of contempt proceedings and felony criminal prosecutions. Although the statute purports to empower *in rem* proceedings, it nevertheless operates *in personam*. Procedural due process is denied because provisions for notice to a non-resident publisher, without any contracts with Arkansas, are inadequate. The statute provides merely for service of the order to show cause by certified mail. Yet on the basis of such service the publisher becomes subject to fine and imprisonment. This court has held to the contrary: *McGee* v. *International Life Ins. Co.*,

355 U.S. 220, *Hanson* v. *Denckla,* 357 U.S. 235. See Restatement, Conflict of Laws, Section 77 (1948), 4 Pomeroy, Equity, Section 1317 (4 ed.).

The appellants do not rest their argument on this procedural deficiency. They merely point it up as part of the totality of defects in the statute which seeks to restrain publishers who are beyond the jurisdiction of Arkansas.

The Postal Laws

The statute seeks to control the shipment of publications by mail. (Sections 2715(1), 2716(1)(2), 2717, 2718, 2724). It is submitted that insofar as the statute seeks to regulate mail shipments, it is clearly in violation of the paramount powers of Congress with respect to the permitted restraints of publications under the First Amendment.

Arkansas has usurped the function of the post office in *explicitly* arrogating to itself the right to punish postal shipment that even the Post Office Department approved. The statute is directed against "mailable matter". "Such matter" is defined (2715(1)) as having second class mailing privileges. Why the state should single out and emphasize "mailable matter" for proscription from mailing is strange. But in doing so, it has extended its activities beyond its presently admissible authority to control *the publications* themselves found within its boundaries. In doing so, it has trespassed on the powers of Congress to regulate what is mailable or non-mailable. 18 U.S.C. 1461; Re *Jackson,* 96 U.S. 727; *Lewis Pub. Co.* v. *Morgan,* 229 U.S. 288; *Manual Enterprises, Inc.* v. *Day,* 370 U.S. 478; *Roth* v. *United States,* 354 U.S. 476. The national post office provides at least some uniformity as to what is mailable.

Cases demonstrating the determination of this court to uphold the policy of Congress to deny intrusion by the states into the postal service when broad policy of uniformity is at stake are: *Pensacola Tel. Co.* v. *Western, etc.*, 96 U.S. 1, in which a state monopoly to operate a telegraph business over post roads was denied as infringing upon Congress' power to regulate postal matters as well as interstate commerce; *Illinois Central Railroad* v. *Illinois*, 163 U.S. 142, which held unconstitutional an Illinois statute which required interstate mail trains to detour seven miles to reach a station. In those cases the conflict with national legislation or policy rendered state action invalid. See also, *Ex Parte Jackson*, 96 U.S. 727, 732, *Cooley* v. *Board of Wardens, etc.*, 12 How. 299; *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250.

Interstate Commerce

By like reasoning the statute in seeking to inhibit and to punish interstate shipment of publications has invaded an area reserved to the federal government. The purpose of the commerce clause in the Constitution was to provide uniformity in regulation of shipments across state lines and to eliminate barriers against such activity. The Arkansas statute destroys that objective and thus trespasses into federal domain. *Bowman* v. *Chicago, etc.*, 125 U.S. 465 and *Leisy* v. *Hardin*, 135 U.S. 100, denied states the power to exclude the importation of alcoholic beverages from other states. What was said of alcoholic beverages applies with greater force to literature for this court has held that literature is of higher rank in constitutional protection than matters of the stomach. *Smith* v. *California*, 361 U.S. 147.

POINT II

The statute on its face and as applied is a vague restraint upon the press.

1. The statute proscribes "obscene" written material. It defines the word that to the average person, applying *contemporary community standards,* the dominant theme of the material taken as a whole appeals to prurient interest. What is wrong with the definition is that one cannot tell what is forbidden by the expression "contemporary community standards". Did it mean the standards of Jefferson County, Arkansas, where the action was brought and into which county the appellants were forbidden to forward their literature, or does it mean the State of Arkansas? If the United States is a community, then its standards should be applied. Certainly, the solution of this problem is of great significance to all shippers of literature across state lines. And its resolution is closely related to the arguments in Point I, insofar as it reveals the problem of a publisher who publishes in accordance with the standards of his state, yet is faced with discovery of standards of another state, not to mention the standards of a county of another state, as in this case.

The Supreme Court of Arkansas could not resolve this ambiguity. It refused to follow what was said in *Jacobellis* v. *Ohio,* 378 U.S. 184 as to a national standard, but fixed no definition itself (R. 46). The question therefore remains unsettled and the statute is as vague as when challenged in that respect (R. 7). Thus, a publisher cannot tell what is forbidden.

In stating, "but we think the evidence clearly established that the contents of the magazines in question are not compatible with the contemporary standards in Pine Bluff, Arkansas", the court below did not remove the ambiguity. It cannot be said that it now regarded the town of Pine Bluff, population 20,000, as the criterion of what may be transported into Arkansas. Indeed, that court's next sentence in the opinion (R. 51) discloses that it was not certain of its position.

A national standard seems to be indicated by the decisions.

Manual Enterprises, Inc. v. *Day*, 370 U.S. 48.
Jacobellis v. *Ohio*, 378 U.S. 184.
Excellent Publications, Inc. v. *United States*, 309 F. 2d 362.
State v. *Hudson County News Co.*, 41 N.J. 247.
Haldeman v. *United States*, 340 F. 2d 59.
State v. *Locks*, 97 Ariz. 148.
State v. *Vollmar*, 389 S.W. 2d 20 (Mo.).

2. Nevertheless, if it should be held that the statement of the court has removed the vagueness, there still remains the difficulty that a construction and application of the statute that inhibits interstate shipment into a state because of the standards of a town of 20,000 persons is an impermissible restraint on the press.

3. The statute is also vague in that it penalizes obscene written matter, "other than mailable matter" (2716(1)(2)). Assuming that we understand what obscenity means, there still remains the question as to what "other than mail-

able matter'' means. Does it mean literature that is transported by means other than the mail or does it mean mail that did not receive the approval of the Post Office Department? ''Mailable matter'' is defined in 2715(1) as material having a second class privilege or which has not been determined to be non-mailable by the United States. But excluding ''mailable matter'' does not produce clarity as to what ''other than mailable matter'' means. Accordingly, a publisher acts at his peril in guessing at what is forbidden.

POINT III

The statute was unconstitutionally applied

1. The trial court rendered its decree which still stands unchanged as to its substance. It provides that the court retains jurisdiction to determine whether future issues are obscene and whether they come within the terms of the order (R. 29). This injunction against future issues of the same magazine is a plain violation of the rule in *Near* v. *Minnesota,* 283 U.S. 697 and *Kingsley Books* v. *Brown,* 354 U.S. 437, 441. The Supreme Court realized that the chancellor was wrong and sought to palliate it by an interpretation that would render the offending decretal words as surplusage. Of course, the chancellor was not a party to the fiction, for his words in the record demonstrate that he intended what he said—to enjoin all future issues. The following colloquy ensued (R. 33 fol. 302):

> ''Mr. Dunaway (Appellants' then counsel): Did I understand the court correctly to say that the sale of these magazines is permanently restrained and

the injunction *will not be* confined to the issues the magazines which are in the suit? (Emphasis supplied.)

The Court: That's right.

* * * * *

The Court: Of course you object. Now that restraining order is in effect now. I don't want any of these magazines sold—these eight magazines so advise your clients."

The decree is still unmodified in that respect and operates as a restraint. The Supreme Court did not strike that portion of the decree and it remains in force.

2. The decree directed the appellants, publishing in New York and Connecticut to destroy all copies of the issues of the magazine within ten days (R. 29). Plainly, the statute so construed violates appellants' right to publish and possess books in New York, unhindered by the directions of a court in another state. Under New York law these publications would have been free of any objection (*People* v. *Richmond County News, Inc.*, 9 N.Y. 2d 578).

Failure of appellants to comply with this direction can lead to a charge of contempt (2725) and extradition (2726).

CONCLUSION

The judgment should be reversed.

It has been shown that the statute in question not only is a prior restraint upon the distribution of literature within a State, but goes farther, and seeks to control the movement of literature across state lines by mail and otherwise. Insofar as the statute is a prior restraint on distribution within the state, it should be stricken, even if it is necessary to overrule *Kingsley Books, Inc.* v. *Brown.*

Insofar as the statute seeks to control the movement of literature from non-resident publishers it is a violent restraint on the free flow of ideas nationwide, in that it intrudes into the postal powers which are exclusively that of Congress, and regulates interstate commerce which is reserved for the Federal Government at least insofar as a policy of a nationwide flow of literature requires. If interstate shipment of alcoholic beverages enjoys constitutional protection from state prohibition, by all the more reason such protection should be afforded to literature.

The statute is deficient in providing a heavy criminal *felony* penalty for its violation, yet is vague as to its definition of the standard to be used to determine what is obscene.

The statute has been unconstitutionally applied in that all future issues of the magazines in question were enjoined from distribution in Jefferson County. Moreover, the decree provided that these non-resident publishers are directed to destroy all copies of the magazines they may

possess, although by the laws of their domicile the magazines are not offensive.

For the foregoing reasons, the judgment should be reversed.

Respectfully submitted,

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APPENDIX A

Act No. 264 of the Laws of 1961, Ann. Stat. 41-2713-41-2728:

"41-2713. Arkansas law on obscenity—Title.—This Act [§§41-2713—41-2728] shall be known as the Arkansas Law on Obscenity and may be referred to by that designation. [Acts 1961, No. 261, §1, p. 935.]

41-2714. Purpose and intent.—The General Assembly hereby determines that during the past several years, the spread of obscene publications has become a matter of increasingly grave concern to the people of this State. The elimination of this evil and the consequent protection of the citizens and residents of this State against those publications are in the best interests of the morals and general welfare of the people. The accomplishment of these ends can best be achieved by providing prosecuting attorneys both with a speedy civil remedy for obtaining a judicial determination of the character and contents of publications and with an effective power to reach non-residents responsible for the composition, publication and distribution of obscene publications within the State. [Acts 1961, No. 261, § 2, p. 935.]

41-2715. Definitions.—The following words, terms and phrases used in this Act [§§ 41-2713—41-2728] shall, for the purpose of this Act, have the meanings respectively ascribed to them in this Section:

(1) 'Mailable matter' means (a) printed or written matter or material having second class mailing privileges under the laws of the United States; or (b) any other printed or written matter or material which has not been determined to be nonmailable under the laws of the United States.

(2) 'Obscene' means that to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.

(3) 'Person' means any individual, partnership, firm, association, corporation or other legal entity.

(4) 'Printed or written matter or material' means any book, pamphlet, magazine, periodical, newspaper, picture magazine, comic book, story paper or other printed or written matter. It does not include written or printed matter or material used by or in any recognized religious, scientific or educational institution. [Acts 1961, No. 261, § 3, p. 935.]

41-2716. Possession, sale or distribution of obscene material unlawful—Penalty.—(1) Every person who, with knowledge of its contents, sends or causes to be sent, or brings or causes to be brought, into this State for sale or commercial distribution, or in this State prepares, publishes, sells, exhibits or commercially distributes, or give [gives] away or offers to give away, or has in his possession with intent to sell or commercially distribute or to exhibit or to give away, any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this Act [§§ 41-2713—41-2728], or who knowingly informs another of when, where, how or from whom or by what means any of these things can be purchased or obtained, shall be guilty of a felony, and upon conviction thereof shall be fined not more than $2,000.00 or be imprisoned for a period not less than one (1) year nor more than five (5) years, or be both so fined and imprisoned.

(2) Every person who, with knowledge of its contents, has in his possession any obscene printed or written matter or materials, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this Act shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000.00 or be imprisoned in the county jail for a period not to exceed one [1] year, or both. [Acts 1961, No. 261, § 4, p. 935.]

41-2717. Action to determine obscenity of mailable matter.—Whenever the Prosecuting Attorney for any county has reasonable cause to believe that any person, with knowledge of its contents, is

(1) Engaged in sending or causing to be sent, bringing or causing to be brought, into this State for sale or commercial distribution, or is

(2) In this State preparing, selling, exhibiting or commercially distributing, or giving away, or offering to give away, or has in his possession with intent to sell or commercially distribute or to exhibit or give away or offer to give away, any obscene mailable matter, the Prosecuting Attorney for the county into which such mailable matter is sent or caused to be sent, brought or caused to be brought, or in which it is prepared, sold, exhibited or commercially distributed or given away or offered to be given away, or possessed, shall institute an action in the Chancery Court for that county for an adjudication of the obscenity of the mailable matter. [Acts 1961, No. 261, § 5, p. 935.]

41-2718. Complaint—Filing—Contents.—The action authorized in Section 5 [§ 41-2717] shall be commenced by the filing of a complaint to which shall be

attached as an exhibit a true copy of the allegedly obscene mailable matter. The complaint shall:

(a) be directed against the mailable matter by name or description;

(b) allege its obscene nature;

(c) designate as respondents and list the names and addresses, if known, of its author, publisher, and any other person sending or causing it to be sent, bringing or causing it to be brought into this State for sale or commercial distribution and of any person in this State preparing, selling, exhibiting or commercially distributing it or giving away or offering to give it away, or possessing it with intent to sell or commercially distribute or exhibit or give away or offer to give it away;

(d) pray for an adjudication that it is obscene;

(e) pray for a permanent injunction against any person sending or causing it to be sent, bringing or causing it to be brought, into this State for sale or commercial distribution, or in this State preparing, selling, exhibiting or commercially distributing it, giving away or offering to give it away, or possessing it with intent to sell or commercially distribute or exhibit or give away or offer to give it away;

(f) pray for its surrender, seizure and destruction. [Acts 1961, No. 261, § 6, p. 935.]

41-2719. Order to show cause—Service.—Upon the filing of the complaint described in Section 6 [§ 41-2718], the Prosecuting Attorney shall present the same, including the exhibit thereto, as soon as practicable to the Court for its examination. If there is no probably [probable] cause to believe that the mailable matter described in the complaint is obscene,

the Court shall dismiss the complaint. If the Court finds probably [probable] cause to believe such mailable matter to be obscene, it shall issue an order to show cuase [cause] why the same shall not be adjudicated obscene, returnable not less than ten (10) days after its service, directed against the mailable matter by name or description and directing the service of a copy thereof, together with a copy of the complaint upon such mailable matter and upon each of the respondents named in the complaint. Service of such order shall be made upon such mailable matter at its place of publication or its editorial offices as shown therein. Service of such order or any copy thereof may be made in any manner provided by law, and in case of mailable matter published or edited outside of the State of Arkansas and of any non-resident respondent, by registered or certified mail directed to the mailable matter of the respondent to be served at the address shown in the complaint. Proof of such mailing shall be deemed to be prima facie evidence of service of such rule or a copy thereof upon the mailable matter or any respondent for the purposes of this Section. [Acts 1961, No. 261, § 7, p. 935.]

41-2720. Answer, trial date.—(1) On or before the return date specified in the order to show cause, the mailable matter and each respondent may file answers or other defenses.

(2) The court may, by order, permit any person to appear and file an answer as amicus curiae.

(3) If no person files an answer or other defense on or before the return date specified in the order to show cause, the court may forthwith determine

whether the mailable matter is obscene and enter an appropriate judgment.

(4) Upon the expiration of the time for filing answers and other defenses by the mailable matter and all respondents the Court may, upon its own motion or upon the application of any party, set a date for the trial of the issues joined. [Acts 1961, No. 261, § 8, p. 935.]

41-2721. Trial procedure.—The public interest requires that all actions prescribed in this Act [§§ 41-2713—41-2728], other than criminal actions under Section 4 [§ 41-2716], be heard and disposed of with the maximum promptness and dispatch commensurate with constitutional requirements, including due process, freedom of press and freedom of speech. The rules of civil procedure pertaining to equity cases shall be applicable to the trial of such actions. [Acts 1961, No. 261, § 9, p. 935.]

41-2722. Judgment—Enforcement.—In the event the Courts [Court] finds the mailable matter to be obscene, it shall enter judgment to such effect and may, in such judgment or in subsequent orders of enforcement thereof:

(a) enter a permanent injunction against any respondent prohibiting him from doing or continuing to do any act condemned by this Act;

(b) direct any resident respondent to dispose of all such obscene mailable matter in his possession or under his control under such conditions and within such time as the Court may find to be reasonable;

(c) if any respondent shall fail to comply with the Court's orders, direct all sheriffs in the State to seize and destroy all such obscene mailable matter in the

possession or under the control of such respondent wherever the same may be found. [Acts 1961, No. 261, § 10, p. 935.]

41-2723. Injunctions—Contents of order granting —Effect.—Every order granting an injunction shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the respondents to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active consert or participation by contract or arrangement with them who receive actual notice of the order by personal service or otherwise.

Copies of all orders of the Court in finding any matter to be obscene, and all orders of injunction issued in regard thereto, shall be served upon all persons, and in the same manner, as is provided in Section 7 [§ 41-2719] of this Act. [Acts 1961, No. 261, § 11, p. 935.]

41-2724. Mailable matter subject to provisions of act.—Any mailable matter which is sent or caused to be sent, brought or caused to be brought, into this State for sale or commercial distribution or which in this State is sold, exhibited or commercially distributed, given away or offered to be given away, by any person with knowledge of the judgment, or is in the possession of any such person with intent to sell or commercially distribute or exhibit or give away or offer to give away, is subject to the provisions of Section 4 [§ 41-2716]. [Acts 1961, No. 261, § 12, p. 935.]

41-2725. Contempt.—Any respondent, or any officer, agent, servant, employee or attorney of such respondent, or any person in active concert or participation by contract or arrangement with such respondent, who receives actual notice, by personal service or otherwise, of any injunction or restraining order entered pursuant to Section 11 [§ 41-2723] and who shall disobey any of the provisions thereof shall be guilty of contempt of court. [Acts 1961, No. 261, § 13, p. 935.]

41-2726. Extradition.—In all cases in which a court has entered its judgment, pursuant to Section 10 [§ 41-2722], that the mailable matter in question is obscene, and a charge of continuing violation is hereafter brought against a person who, being a respondent to such judgment, cannot be found in this State, the Governor of this State shall, unless such person shall have appealed from such judgment and such appeal has not been finally determined, demand his extradition from the Executive Authority of the State in which such person may be found, pursuant to the laws of this state. [Acts 1961, No. 261, § 14, p. 935.]

41-2727. Possession creates a presumption.—The possession of any three (3) of the things enumerated in Section 4 [§ 41-2716] of this Act (except the possession of them for the purpose of return to the person from whom received) shall create a presumption that they are intended for sale or commercial distribution, exhibition or gift, but such presumption shall be rebuttable. The burden of proof that their possession is for the purpose of return to the person from whom received shall be on the possessor. [Acts 1961, No. 261, § 15, p. 935.]

Appendix A

41-2728. Non-resident—Consent to jurisdiction—Procedure.—In order to protect the morals and general welfare of the citizens and residents of this State against obscene printed or written matter or material originating outside this State, it is the purpose of this Section to subject to the jurisdiction of the courts of this State those persons who are responsible for the importation of such matter into this State and, by such act submits himself to the jurisdiction of the courts of this State in any action authorized by Section 5 [§ 41-2717]. [Acts 1961, No. 261, § 16, p. 935.]''